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QUESTION PRESENTED

May a state constitutionally channel jury discretion in capital sentencing by requiring the defendant to bear the burden of proving a factor in mitigation unanimously?

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No. 88–5909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOCK MCKOY, JR.,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE RESPONDENT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The State of North Carolina, by and through its attorney, the Attorney General of North Carolina, files this Brief.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On December 22, 1984, Dock McKoy, Jr. murdered Anson County Deputy Sheriff Kress Horne. The Anson County grand jury returned an indictment against McKoy for this first-degree murder. Trial venue was changed to Stanly County, where McKoy was tried at the July 29,

1985 Criminal Session of Stanly County Superior Court, presided over by the Honorable William H. Freeman. At the conclusion of the guilt-innocence phase, the jury returned a guilty verdict of first-degree murder.

During the penalty phase, the jury found two aggravating factors unanimously and beyond a reasonable doubt. Further, they found two of the eight submitted mitigating factors unanimously and by a preponderance of the evidence. The jury found unanimously and beyond a reasonable doubt that the two aggravating factors outweighed the two mitigating factors. Finally, the jury found unanimously and beyond a reasonable doubt that the two aggravating factors, when considered with the two mitigating factors, were sufficiently substantial to warrant imposition of the death penalty. The jury unanimously recommended that Dock McKoy be sentenced to death.

McKoy appealed his judgment to the Supreme Court of North Carolina. After this Court's issuance of its opinion in *Mills v. Maryland*, 486 U.S. ___, 108 S.Ct. 1860 (1988), the Supreme Court of North Carolina ordered further briefing and oral argument in light of *Mills*. On September 7, 1988, the Supreme Court of North Carolina held, in a 5–2 opinion, that North Carolina's unanimity requirement as to mitigating factors did not violate *Lockett v. Ohio*, 438 U.S. 586 (1978) or *Mills*. *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988). McKoy petitioned this Court for a writ of certiorari on November 15, 1988. On February 21, 1989, this Court granted the writ of certiorari.

B. Statement of Facts

In 1984, Dock McKoy[1] resided in Anson County, North Carolina (T. 440–41).[2] On the morning of December 22,

[1]For clarity, the petitioner will be referred to as "McKoy."
[2]References to "T" designate the transcript of the trial.

1984, McKoy's neighbor, Haywood Haskell, observed McKoy standing on his front porch with a shotgun (T. 447–48). McKoy fired two shots into the air. Mr. Haskell told McKoy that he should not fire the weapon because he could harm the children in the neighborhood. McKoy replied that it was Christmas and that everyone was shooting. Mr. Haskell telephoned law enforcement officials to report the incident (T. 448).

At approximately 11:50 a.m., Deputy Calvin Lambert of the Anson County Sheriff's Department received the report that McKoy was drunk and was firing a shotgun (T. 484). Deputy Lambert was in uniform when he responded to the call and drove to the scene in a marked patrol car (T. 485). Mr. Haskell directed him to McKoy's house (T. 487). As he reached the porch, the deputy called to McKoy through the screen door and told McKoy that he needed to see him concerning a complaint. Receiving no response, Deputy Lambert again asked McKoy if he would step onto the porch. McKoy stood in the doorway and looked through the screen door (T. 489). Deputy Lambert believed that McKoy was intoxicated (T. 507–08). The deputy told McKoy not to fire the gun because he was drunk. Deputy Lambert advised McKoy not to go outside and not to endanger people in the neighborhood by firing his weapon (T. 489). McKoy asked if he could fire his shotgun in the woods, and the deputy told him to sober up first. As Deputy Lambert drove away, McKoy stepped onto the porch and said something to the deputy. Deputy Lambert stopped his vehicle and asked McKoy what he said. McKoy turned and went inside without answering. After remaining a few moments to make certain McKoy did not come back outside, Deputy Lambert left the area (T. 490).

Later that afternoon, McKoy fell down a wet bank in front of his outhouse and yelled for help (T. 467). Another neighbor, Mr. Harshaw, helped him up the hill (T. 467–68). Because McKoy was locked out of the house, they pried

open a window to get inside. Once McKoy was back inside, Mr. Harshaw left (T. 468).

Shortly afterwards, McKoy asked thirteen-year-old neighbor Mark Cox to help close the window which had previously been pried open (T. 468). Mark asked McKoy to get him a hammer. When McKoy refused, Mark walked back to Mr. Haskell's. McKoy then accused Mark of taking a one-hundred dollar bill (T. 521). Mr. Haskell tried to explain that the boy did not have the money because he had not been inside the house (T. 456). In fact, earlier Mr. Harshaw had found McKoy's wallet and returned it (T. 468). However, McKoy refused to listen and fired his shotgun at the young boy. Immediately, Mark ran toward his own house for safety. As Mark ran, McKoy fired two more shots in Mark's direction. Some other children were in the line of fire (T. 453). Continuing to flee from McKoy, Mark ran inside his home (T. 525).

Lilly Smith, Mark's sister, was standing in Mark's front yard with her two young daughters, ages seven and four, and Purcell Sellers (T. 532–34). When they saw McKoy walking down the street with a shotgun, they ran towards the rear of the house (T. 535). As they reached the corner, McKoy again fired the shotgun, and a pellet struck Ms. Smith's leg (T. 536). Purcell Sellers was also struck during this episode (T. 573).

Ms. Smith locked the back door and was on her way to lock the front door when McKoy barged into their house holding his shotgun (T. 537). When Ms. Smith attempted to explain to McKoy that Mark did not have the money, McKoy told her to be quiet and twice threatened to shoot her. Ms. Smith grabbed her young daughter by the hand and left the house. Finally, McKoy left and the police were called (T. 538).

Lieutenant Robert Usrey and Deputy Kress Horne of the Anson County Sheriff's Department received the call at approximately 4:45 p.m. that someone was shooting at

some children (T. 569–70). They entered the driveway between Mr. Haskell's house and McKoy's house in a patrol car (T. 570–71). Lieutenant Usrey was driving and his door was nearest McKoy's house. Lieutenant Usrey got out of the patrol car and spoke with Mr. Haskell. Deputy Horne stood by the patrol car (T. 571).

After this conversation, the officers asked McKoy to step out of the house so they could talk. McKoy refused and ordered them to leave or he would kill them. Deputy Horne again asked McKoy to step out so they could get the matter cleared up. McKoy replied that if the officers left he would come outside. Lieutenant Usrey again spoke with Mr. Haskell about McKoy (T. 572). The officer then walked around the Haskell residence and spoke with Ms. Smith and Mr. Sellers who had previously been struck by pellets from McKoy's shotgun (T. 573). He advised them to go to the magistrate's office and obtain a warrant for McKoy's arrest. At this time Deputy Horne was standing on the passenger's side of the patrol car at the rear door (T. 573).

Lieutenant Usrey returned to the patrol car. Again, the officers requested that McKoy come outside and talk to them. During this period, Detective John Moore arrived on the scene. McKoy, still refusing to come out of his house, told the officers to leave and then he would come outside. They replied that they could not leave, that they wanted to straighten the matter out (T. 574). By this time Deputy Henry Watkins had arrived. He was instructed to transport Ms. Smith and Mr. Sellers to the magistrate's office and to inform the other officers when the warrants had been obtained (T. 575). Lieutenant Usrey spoke with Mr. Haskell concerning the floor plan of McKoy's house. Afterwards, he returned to the patrol car where Deputy Horne was still stationed at the rear door and the officers discussed what they would do once the warrants had been obtained. They determined that Deputy Horne and the

other officers would continue to talk to McKoy in an effort to persuade him to come outside while Lieutenant Usrey would try to enter through the back of the house (T. 576). Lieutenant Usrey went to the back of McKoy's house to try to locate an entrance. Deputy Horne continued to call to McKoy (T. 576–77).

As Lieutenant Usrey was returning to the front of McKoy's house, McKoy aimed his shotgun out the door and fired (T. 577). The blast struck Deputy Horne and caused him to collapse. McKoy gave no warning to the officer before he fired (T. 548). When Lieutenant Usrey called out to the other officers, Detective Moore answered, but Deputy Horne did not respond. Lieutenant Usrey then observed Deputy Horne lying on his back and heard a gurgling noise coming from the downed officer (T. 578). As he got closer to Deputy Horne, Lieutenant Usrey observed blood squirting upward six to ten inches from Horne's face. An ambulance was called and after it arrived, Lieutenant Usrey took a stretcher and crawled to Deputy Horne. When he reached Deputy Horne, he saw that his face was obliterated, leaving only a mass of bloody tissue. Deputy Horne was still bleeding from the mouth and his hand was twitching (T. 579). An ambulance attendant responded to Lieutenant Usrey's plea for assistance, crawled to Deputy Horne and assisted in placing him on a stretcher. They managed to pull Deputy Horne approximately twenty feet to safety where he was placed in an ambulance (T. 580). Later that evening, Deputy Horne died as a result of the injuries to his face and brain (T. 638, 644).

As other officers arrived, McKoy was ordered to throw his weapon outside but he did not respond. The officers warned McKoy that if he did not surrender, tear gas would be used. When he did not answer, a tear gas container was thrown through a window (T. 580). At that point McKoy fired another shot. Approximately thirty seconds later,

McKoy fired an additional shot. The officers began returning fire and McKoy was wounded superficially. After this short exchange, McKoy appeared at the door, holding his shotgun pointed downward. McKoy continued to hold the shotgun despite having been ordered to throw it down. Detective Moore approached McKoy from behind and took the shotgun. McKoy was then handcuffed and transported to Anson County Hospital (T. 580–82).

Special Agent Carl Jackson of the State Bureau of Investigation observed McKoy at the hospital at approximately 8:15 p.m. (T. 807–08). Following his release from the hospital, McKoy was taken to the parking lot of the Sheriff's Department (T. 808). He had a bandage over his head which partially covered his left eye. Agent Jackson and two other officers transported McKoy to Raleigh in the Sheriff's Department van. En route, McKoy was read his *Miranda* rights (T. 809). McKoy responded that he understood his rights (T. 811). At *voir dire* the officers testified that he stated, "[I] was tried for my life and I understood all this stuff" (T. 704). During the trip, McKoy stated that he was thirsty. The officers stopped the van and purchased two soft drinks for him (T. 812). Thereafter, Agent Jackson asked McKoy what had happened earlier that day at his house (T. 813). McKoy related that some boys came into his house, hit him and took his money. He stated that he chased the boys and shot for the purpose of scaring them (T. 814). He said after this incident the police came to his house and talked to him about shooting at the boys. According to McKoy, he then told the police that they should be out chasing those boys. McKoy stated that the police left, but later returned and wanted to arrest him. He told them that he was not going anywhere. McKoy stated that an officer drew his weapon. McKoy told the agent that he had consumed half a pint of whiskey and some beer earlier that day. McKoy then told Agent Jackson that he was tired and wanted to take a break (T. 815–16).

Because McKoy said he was cold, the heat was turned up in the van. After a short period, Agent Jackson asked McKoy if he wanted to talk. McKoy stated that he did not want to talk to him (T. 817). Deputy Pratt then asked McKoy if he wanted to talk to him and McKoy agreed (T. 716, 817–18). When asked why he shot the deputy, McKoy responded that "he pressured me the wrong way." Deputy Pratt asked McKoy if he was afraid for his life and McKoy replied that he was afraid at that moment. The officers assured him that he was being taken to Central Prison for safekeeping and that the officers were there to protect him. McKoy was asked "if you had it to do all over again the same way, you would?" He responded, "'I'll fight until I die.'" He continued by stating, "Yes, but I'd probably do it quicker." When Deputy Pratt asked McKoy if he knew he had shot a police officer, McKoy stated, "'So what, a police officer ain't no more to shoot than anybody else'" (T. 818–19).

Dr. Merceda Perry, a physician at Anson County Hospital, treated McKoy in the emergency room for a laceration of the skull and a wound to the left buttock (T. 840, 842–43). McKoy neither complained of any pain nor was he given any medication for pain. However, a tetanus shot and local anesthesia were administered before treatment. At first, McKoy did not respond coherently to the doctor's questions (T. 846). Dr. Perry noted that McKoy had a strong odor of alcohol (T. 847) and at approximately 6:30 p.m., McKoy's blood alcohol level was .26 (T. 848–49). According to Dr. Perry, McKoy was not in shock. The doctor also noted that McKoy received about three fourths of a quart of intravenous fluid at the hospital (T. 851). After receiving the fluids, Dr. Perry explained that McKoy began "coming around" (T. 852). Before leaving the hospital, McKoy was answering the doctor's questions in a coherent manner (T. 853). McKoy acknowledged to Dr. Perry that he had shot a police officer (T. 855). Dr. Perry released McKoy to be transported to the medical

unit at Central Prison (T. 857).

Dr. Bob Rollins, a forensic psychiatrist at Dorothea Dix Hospital, testified as a defense witness (T. 858). Rollins first examined McKoy on June 20, 1985 (T. 890), while McKoy was in jail in Stanly County awaiting trial (T. 866). At the time of this examination, McKoy was sixty-five years old and blind in his right eye (T. 868). Dr. Rollins diagnosed McKoy as having a basic personality disorder. In addition, it was his opinion that McKoy was "borderline intellectual functioning," having scored 74 on an IQ test. He stated, however, that McKoy was not mentally retarded. Other diagnoses included "episodic alcohol abuse," "alcohol intoxication, recovered," and "organic delusional syndrome" (T. 870). In the doctor's opinion, McKoy could not distinguish between right and wrong at the time of the offense (T. 889).

On cross-examination, Dr. Rollins related that in 1980 McKoy scored 89 on an IQ test (T. 891). Dr. Rollins also noted that McKoy had held a job for approximately four years with the State Department of Transportation and that he was employed at the time of the shooting (T. 902–03). Dr. Rollins believed McKoy understood right from wrong at the time of the trial (T. 903).

McKoy testified in his own behalf (T. 911). He stated that he had been working on the "tar gang" for about four years (T. 912). According to McKoy, on the day of the incident, the Sheriff came to his house and shot at his door. The Sheriff told him he had come to arrest "Paul McCoy" (T. 915). On cross-examination McKoy testified that he had not had any trouble performing his job and he did not drink liquor (T. 936–37). McKoy acknowledged that in 1977 he had been convicted of shooting at some persons with a shotgun (T. 940).[3] However, he denied

[3] *See State v. McCoy* [sic], 34 N.C.App. 567, 239 S.E.2d 300 (1977) (McKoy's 1977 convictions for discharging a shotgun into an occupied dwelling and four assaults with a deadly weapon were upheld.)

shooting a police officer (T. 984). The jury returned a verdict of guilty of first-degree murder (T. 1078).

At the sentencing phase of the trial before the same jury, pursuant to N.C. Gen. Stat. 15A-2000 *et seq.* (1983), Ms. June Monroe, the Assistant Clerk of Court for Scotland County (T. 1086), identified a certified copy of a commitment of McKoy for the charge of second-degree murder to a term of years entered November 28, 1952 (T. 1104–05). This plea and judgment showed that McKoy entered a plea of guilty to second-degree murder (T. 1106–07).[4]

Dr. Patricio Lara, a psychiatrist at the forensic unit of Dorothea Dix Hospital, testified that at the time of the offense, McKoy's intoxication, together with his limited intellectual functioning and personality disorder, resulted in an impairment of his ability to conform his conduct with the requirements of the law (T. 1110, 1116–17).

On cross-examination, Dr. Lara noted that when he examined McKoy in February, 1985, two months after the murder, McKoy's speech was clear and his thought process was coherent (T. 1117–18). Dr. Lara found no evidence of hallucinations, delusions, or psychosis. In Dr. Lara's opinion, McKoy's paranoid beliefs resulted from his personality disorder (T. 1119). McKoy's supervisor at work had reported that McKoy was a good worker and was never intoxicated on the job (T. 1120). Dr. Lara noted that McKoy was able to care for himself. When Dr. Lara examined McKoy, he found him competent to stand trial (T. 1127). Dr. Lara explained that in general it was not unusual for persons charged with crimes to have personality disorders (T. 1128).

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[4]*See State v. McCoy* [sic], 236 N.C. 121, 71 S.E.2d 921 (1952). (McKoy's 1951 conviction for a first-degree murder—perpetrated with an axe and knife—and death sentence were reversed and remanded for a new trial. Upon remand he pled guilty to second-degree murder.)

McKoy recalled Dr. Rollins during the sentencing phase. He testified that McKoy was under the influence of a mental or emotional disturbance at the time of the shooting, and that McKoy's ability to appreciate the criminality of his conduct was impaired (T. 1132–33).

The following issues as to punishment were submitted to and answered by the jury:

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: Yes.

* * *

1. Had Dock McCoy been previously convicted of a felony involving the use of violence to the person?

ANSWER: Yes.

2. Was this murder committed against a deputy sheriff while engaged in the performance of his official duties?

ANSWER: Yes.

* * *

Issue Two:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: Yes.

* * *

1. This murder was committed while Dock McCoy was under the influence of mental or emotional disturbance.

ANSWER: No.

2. The capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER: Yes.

3. The age of Dock McCoy at the time of this murder is a mitigating circumstance.

ANSWER: No.

4. That for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

ANSWER: No.

5. That Dock McCoy has borderline intellectual functioning with an IQ test score of 74.

ANSWER: Yes.

6. That Dock McCoy's mental and emotional disturbance is aggravated by his poor physical health.

ANSWER: No.

7. Dock McCoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

ANSWER: No.

8. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER: No.

* * *

Issue Three:

4. Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: Yes.

* * *

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: Yes.

(J.A. 23–26)

SUMMARY OF ARGUMENT

The North Carolina capital sentencing instructions suffer from no constitutional infirmity. Unlike the instructions found defective in *Mills v. Maryland*, 486 U.S. ___, 108 S.Ct. 1860 (1988), North Carolina's instructions clearly guide the jury's consideration of evidence proffered in mitigation, including its determination of the continued legal relevance of that evidence. Therefore, *Mills* does not control since *Mills* addressed ambiguous sentencing instructions, not the validity of burdens of proof in capital cases.

North Carolina's requirement that mitigating factors, as well as the aggravating factors against which they are weighed, be found unanimously does not offend *Lockett v. Ohio*, 438 U.S. 586 (1978). All evidence proffered in mitigation is fully considered by the jury in deciding which mitigating factors have been proved to exist. Evidence sufficiently reliable to support a mitigating factor remains legally relevant for use at all stages of the sentencing process. Evidence that is insufficiently reliable to convince the entire jury that it supports a mitigating factor loses its continued relevancy for the balancing stages of the sentencing proceeding.

The unanimity requirement for proof of mitigating factors is simply a burden of proof of the type states historically have been free to impose upon a defendant. There is nothing unique about capital sentencing in North Carolina which mandates an exception to the state's traditional right to ensure that mitigation "has been established with reasonable certainty." *Patterson v. New York*, 432 U.S. 192, 209 (1977). The burden of proof guarantees that standardless sentencing not occur. It furthers the eighth amendment goal of reliability in sentencing by ensuring that only evidence reliably proven, both in aggravation and mitigation, forms the basis for the sentencing recommendation. It serves to focus and channel juror discretion as approved by a plurality of this Court in *Franklin v. Lynaugh*, 487 U.S. ___, 108 S.Ct. 2320 (1988).

North Carolina's sentencing structure, especially with its fourth issue which calls upon the jury to make the discretionary decision of whether the death penalty is warranted, creates no danger that the burden of proof imposed upon the defendant will mandate a death sentence or cause the jury to return an unreliable sentence of death.

Nothing about the present case casts doubt on the appropriate policy choice North Carolina has made in trying to accommodate with a fine precision the competing interests of "clear guidance to assure relative equality in treatment, and discretion to consider individual factors whose weight cannot always be preassigned. . . ." *Lockett*, 438 U.S. at 620 (Marshall, J., concurring).

ARGUMENT

A STATE MAY CONSTITUTIONALLY CHANNEL JURY DISCRETION IN CAPITAL SENTENCING BY REQUIRING THE DEFENDANT TO BEAR THE BURDEN OF PROVING A FACTOR IN MITIGATION UNANIMOUSLY.

This case presents a corollary of the issue addressed by a plurality of this Court in *Franklin v. Lynaugh*, 487 U.S. ___, 108 S.Ct. 2320 (1988): In an effort to achieve a more rational and equitable administration of the death penalty, may a state constitutionally channel jury discretion in capital sentencing by requiring the defendant to bear the burden of proving a factor in mitigation unanimously? Or, stated in another manner: To ensure reliability, may a state deem evidence "legally irrelevant" for further use in a capital sentencing procedure if that evidence is not found by the jury unanimously to support a mitigating factor? *Mills v. Maryland*, 486 U.S. ___, 108 S.Ct. 1860, 1865 n. 7 (1988).

There is no assertion by McKoy that he was precluded from introducing for the jury's consideration any particular mitigating evidence. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Likewise, he makes no argument that there was less than full consideration of his mitigating evidence by all the jurors at an initial stage of the sentencing proceeding. Rather, he simply is dissatisfied with the point at which the jury terminated its consideration of evidence proffered in mitigation which was not found unanimously to support a mitigating factor. His conclusion that North

Carolina's unanimity requirement "plainly violates" *Mills* oversimplifies the issue. (Brief at 19) According to McKoy, since theoretically a single juror had the power to prevent or, in McKoy's terminology, "blackball" the entire jury from considering a mitigating factor, the North Carolina unanimity requirement is unconstitutional. He belittles the distinctions drawn by the Supreme Court of North Carolina as misapprehending *Mills* and as "creative jurisprudence." (Brief at 30, 36)

It is McKoy who misapplies *Mills*. The concern in *Mills* was not whether Maryland could, consistent with the eighth amendment, require unanimity as to the finding of mitigating factors. Rather, *Mills* involved possible ambiguity in instructions concerning the further use and consideration of evidence conceded to be relevant under Maryland law. As Justice White stated, concurring in *Mills:* "The issue in this case is how reasonable jurors would have understood and applied their instructions. That is the issue the Court's opinion addresses, and I am persuaded that the Court reaches the correct solution." 108 S.Ct. at 1872. The burden of proof issue was not presented to or decided by this Court in *Mills*.[5] Therefore, *Mills* cannot be construed as prohibiting states from requiring defendants in capital cases to carry a traditional burden of persuasion as to matters particularly within their own knowledge.

Here, in accordance with North Carolina's well-established evidentiary rules, the sentencing instructions unambiguously guided the jury in its consideration of evidence proffered in mitigation by McKoy. The jury reasonably understood that it could not continue to consider "irrelevant" mitigating evidence—that is, evidence found by less than a unanimous jury—to support a factor in mitigation. It is the absence of ambiguity in the sentencing instructions that renders *Mills* not controlling in this case. North Carolina's unanimity requirement is a constitutionally acceptable method of channelling jury discretion "by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Franklin*, 108 S.Ct. at 2320, *quoting*, *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion).

[5]This Court has recognized that a unanimity requirement takes on the characteristics of a burden of proof. "We perceive nothing unconstitutional or invidiously discriminatory, however, in a State's insisting that its burden of proof be carried with more jurors where . . . more severe punishments are at issue." *Johnson v. Louisiana*, 406 U.S. 356, 364 (1972).

A. Mills v. Maryland Does Not Hold Unanimity Requirements Per Se Unconstitutional.

"The decision in *Mills* appears to be statute-specific." *State v. McKoy*, 323 N.C. 1, 43, 372 S.E.2d 12, 35 (1988). It does not pronounce a broad constitutional rule prohibiting states from imposing, as a matter of policy, burdens of proof designed to channel and focus sentencer discretion in capital cases. *Franklin*. In *Mills*, this Court, in a 5–4 decision, held that instructions which might have precluded jurors from considering in mitigation evidence which the Maryland Court of Appeals had held remained relevant throughout the balancing process, risked the erroneous imposition of a sentence of death in violation of *Lockett; Eddings v. Oklahoma*, 455 U.S. 104 (1982); and *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Pursuant to Maryland's capital sentencing procedure, when an aggravating factor is found unanimously but no mitigating factors are found, the sentencer, without any further consideration of the appropriateness of the punishment, must return a sentence of death. Once the sentencer finds mitigating factors, these factors are weighed against the aggravating factors previously found. If the jury determines the aggravating factors outweigh the mitigating factors, a death sentence must be imposed. Md. Ann. Code art. 27 § 413 (1987 Rep. Vol.).

In response to an argument that a unanimity requirement, combined with the Maryland statute's lack of discretion, converts the statute as applied into a mandatory one, the Maryland Court of Appeals made a policy choice in *Mills v. State*, 310 Md. 33, 527 A.2d 3 (1987). The Maryland court held, as a matter of state law, that evidence introduced in mitigation remained relevant to the sentencing process even where a criminal defendant had failed to carry his burden of unanimously proving the existence of a mitigating factor based upon that evidence. The Maryland court then concluded the instructions given in *Mills* had transmitted that interpretation of state law to the sentencing jury.

In the view of five members of this Court, the instructions actually given to the jurors in *Mills* likely did not convey to the jury the "saving construction" placed on the statute by the Court of Appeals. Rather, reasonable jurors could have believed they were precluded from continuing to consider relevant evidence in mitigation during the balancing process if that evidence had not been found unanimously to support a mitigating factor.

Justice Blackmun, writing for the majority, noted that the Maryland Court of Appeals had not suggested, nor had the State of Maryland argued, that mitigating evidence could be rendered "legally irrelevant" by failure of the jury to find unanimously the evidence supports a particular mitigating factor. 108 S.Ct. at 1865 n. 7. While not the basis for the Court's decision, concern for the mandatory and draconian consequences of a failure to find a mitigating factor was clearly present in *Mills*. 108 S.Ct. at 1864–65. *Mills* repeatedly emphasized the ambiguity of the instructions possibly required a death sentence when the jury may have felt a lesser sentence appropriate.

Thus, *Mills* considered the limited issue of whether the sentencing instructions given accurately guided individual jurors in considering evidence in mitigation concededly relevant pursuant to state law, and whether the ambiguity in the instructions presented an issue of constitutional dimensions due to the lack of juror discretion in the Maryland sentencing scheme. *Mills* did not hold that the eighth amendment precludes states, *per se*, from placing a burden of persuasion on a defendant to prove the existence of mitigating factors unanimously. Presented now directly with this issue, this Court should not so hold. To do so would undermine North Carolina's proper "role in structuring or giving shape to the jury's consideration of . . . mitigating factors." *Franklin*, 108 S.Ct. at 2329.

B. North Carolina Procedure

1. Legal Relevancy Determination

North Carolina, unlike Maryland, has made the policy determination that evidence not found unanimously to support a mitigating factor cannot be used during the final weighing and balancing steps of its death penalty sentencing procedure. Due to the differences between the Maryland and North Carolina sentencing proceedings, North Carolina's policy choice presents no risk of an arbitrary sentencing result, but guarantees that the sentencing occur pursuant to objective reviewable standards.

In reliance on the assurances given by this Court in *Patterson v. New York*, 432 U.S. 192 (1977), North Carolina places a burden of proof upon a defendant to prove the existence of the mitigating factors upon which he relies by a preponderance of the evidence. *State v. Johnson*, 298 N.C. 47, 75 n. 28, 257 S.E.2d 597, 618 n. 28 (1979). In 1983, the Supreme Court of North Carolina affirmed in *State v. Kirkley*, 308 N.C. 196, 217–19, 302 S.E.2d 144, 157 (1983), *overruled on other grounds*, *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), that this evidentiary burden requires juries to find the existence of factors in mitigation, like factors in aggravation, unanimously. The Court

stated:

> The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances. The unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists. With the exceptions of who has the burden of proof and the different quantum of proof required to establish the existence of a circumstance, we see no reason to distinguish the method a jury must use in finding the existence or nonexistence of aggravating and mitigating circumstances during the sentencing procedure. It must be kept in mind that when the sentencing procedure begins there are no aggravating or mitigating circumstances deemed to be in existence. Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case.
>
> In determining whether a mitigating circumstance exists, the jury is free to consider all the evidence relevant to that circumstance. This procedure is in accord with the requirements of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma*, ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). We therefore find no error in the trial judge's instructions to the jury concerning the unanimity requirement on mitigating circumstances.

308 N.C. at 219, 302 S.E.2d at 157.

Evidence insufficiently reliable to convince the entire jury of the existence of a mitigating factor becomes, in effect, legally irrelevant for further use in the sentencing

proceeding. *McKoy*, 323 N.C. at 40–41, 372 S.E.2d at 33. "If all jurors do not agree on a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes." 323 N.C. at 41, 372 S.E.2d at 34.[6] As emphasized by the Supreme Court of North Carolina, this determination of the continued legal relevance of evidence is an important distinction between *Mills* and this present matter. *McKoy*, 323 N.C. at 40–41, 372 S.E.2d at 33. The cases in which this Court has addressed issues concerning the introduction and consideration of a defendant's evidence proffered in mitigation have consistently referred to "relevant mitigating evidence." *Hitchcock*, 481 U.S. at 393; *Eddings*, 455 U.S. at 114; *Lockett*, 438 U.S. at 604.

Contrary to McKoy's argument, *Skipper v. South Carolina*, 476 U.S. 1 (1986) does not preclude this type of relevancy determination. In *Skipper*, this Court held that a state could not declare as irrelevant and inadmissible categories of evidence which arguably supported a basis for a sentence less than death. The relevancy determination required here is of an entirely different character. It in-

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[6]McKoy suggests that the North Carolina Supreme Court's determination in his case that evidence is "legally irrelevant" if it is insufficiently reliable to prove the existence of a mitigating factor unanimously is merely a sham or *pendente lite* ruling designed to avoid the perceived holding in *Mills*. Such an assertion is unwarranted. This Court, in *Eddings v. Oklahoma*, 455 U.S. 104, 113 n. 9 (1982) recognized that a petitioner need not provide "citation to book and verse" in order to present appropriately an issue for review by the Court pursuant to its *certiorari* jurisdiction. So too, a finding that evidence is irrelevant for further use in a sentencing process need not be specifically denominated "legally irrelevant" when that is the result of the decision. *State v. McKoy* simply expressed explicitly what had been implicit since the 1983 decision of the Supreme Court in *State v. Kirkley*: Evidence proffered to prove mitigation, just as evidence proffered to prove aggravation, loses its continued relevancy for use in the balancing steps of a capital sentencing proceeding if it is insufficiently reliable to convince all twelve jurors of its existence.

volves the continued viability of evidence which failed to survive a traditional burden of proof standard. *Skipper*, like *Lockett*, "does not hold the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." *Franklin*, 108 S.Ct. at 2329. *Skipper* has no application to a relevancy requirement such as the present one. Continued relevancy in this context simply pertains to the state ensuring that jury consideration of mitigating evidence not be undirected or unfocused, but rather channelled in an effort to achieve a rational sentencing determination. *Franklin*, 108 S.Ct. at 2330.

2. Capital Sentencing Procedure

In North Carolina, capital sentencing is solely by the jury. N.C. Gen. Stat. § 15A-2000(a) (1983). It is a four-step progression culminating in the return of a binding recommendation of a life or death sentence. The jury's findings concerning each of the four steps, where reached, must be recorded on an issues and recommendation sheet. N.C. Gen. Stat. § 15A-2000(c) (1983). This form helps to guide the jurors throughout the sentencing process. The Supreme Court of North Carolina also employs this issues sheet in conducting its statutorily mandated proportionality review. N.C. Gen. Stat. § 15A-2000(d) (1983). *See State v. Noland*, 312 N.C. 1, 320 S.E.2d 642, *cert. denied*, 469 U.S. 1230 (1984).

In the first step, the jury must find unanimously and beyond a reasonable doubt the existence of one or more of the eleven statutory aggravating factors. N.C. Gen. Stat. 15A-2000(e) (1983). Failure of all twelve to agree requires a finding that the factor does not exist. *Kirkley*, 308 N.C. at 219, 302 S.E.2d at 157. If one or more aggravating factors are found, in the second step the jury must unanimously determine—but by only a preponderance of the evidence—the existence of any statutory or non-statutory mitigating factors. *Kirkley*. If all twelve fail to agree on a mitigating factor, then the jury answers that the factor does not exist. *Kirkley*.

In the third step, the sentencer balances the factors proven in aggravation and mitigation against each other. The state must prove unanimously and beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors. N.C. Gen. Stat. § 15A-2000(c) (1983). If the state carries its burden, or if no mitigating factors have been found, the jury then determines the fourth issue. This step requires the state to prove again unanimously and beyond a reasonable doubt that the proven aggravating factors, as diminished by the proven mitigating factors, are sufficiently substantial to warrant imposition of the death penalty. *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865 (1983). Only if the jury finds the aggravating factors sufficiently substantial to warrant imposition of the death penalty is the jury permitted to return a recommendation of death. *Id.*

Thus, in addition to proving statutory aggravating factors, the state must overcome unanimously and beyond a reasonable doubt two discretionary hurdles before a death sentence must be recommended by a North Carolina jury. The requirements that the state prove the presence of aggravation, that the aggravating factors outweigh any mitigating factors, and that the aggravating factors as diminished by mitigating factors are sufficiently substantial to warrant imposition of the death penalty place evidentiary burdens on the state far in excess of that required constitutionally. *Zant v. Stephens*, 462 U.S. 862, 874–75 (1983). These requirements demonstrate that the state, not the defendant, bears nearly the entire risk of nonpersuasion. *See Bullington v. Missouri*, 451 U.S. 430, 446 (1981). Failure by the state to carry its burdens of proving unanimously that at least one aggravating factor exists, that the aggravating outweigh the mitigating factors, or that the aggravating factors are sufficiently substantial to

warrant a death sentence mandates life. Therefore, under North Carolina's capital punishment procedure, the risk condemned in *Mills*—that one juror's actions compel the death penalty—simply is not present. The defendant has only the minimal burden of proving the presence of mitigating factors unanimously by a preponderance of the evidence. Failure to carry this burden does not automatically mandate a sentence of death. The only real risk falls upon the state—a single juror may prevent the state from carrying its burden on one of the three issues that must be answered affirmatively before the jury may recommend a death sentence. In North Carolina, one juror may force the imposition of a life sentence, but not a death sentence.

The weighing of proven factors in aggravation against the factors found in mitigation creates no presumption that death is the appropriate sentence. Juries in North Carolina frequently have returned life sentence recommendations even after answering in Issue Three that the proven factors in aggravation are not outweighed by the proven mitigating factors. Thus, the fourth sentencing issue in North Carolina guarantees that lack of unanimity as to mitigating factors cannot alone compel a death sentence.[7] As the Supreme Court of North Carolina recog-

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[7]In *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986) the jury in the sentencing phase found two statutory factors in aggravation but found no factors in mitigation. Yet, the jury returned a recommendation of life imprisonment after determining that the aggravating circumstances found were not sufficiently substantial to call for the imposition of the death penalty.

In at least twenty-three other capitally-tried cases, juries have returned life sentence recommendations after finding both factors in aggravation and mitigation and after finding that the factors in aggravation outweighed the mitigating factors. However, these juries have found the aggravating factors not to be sufficiently substantial to call for the imposition of the death penalty. *State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989); *State v. Drayton*, 323 N.C. 585, 374 S.E.2d 262 (1988); *State v. Darden*, 323 N.C. 356, 372 S.E.2d 539 (1988); *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988); *State v.*

(Footnote 7 continued on following page)

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Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988); *State v. Fisher*, 321 N.C. 19, 361 S.E.2d 551 (1987); *State v. Austin*, 320 N.C.276, 357 S.E.2d 641 (1987); *State v. Williams*, 319 N.C. 73, 352 S.E.2d 428 (1987); *State v. Holland*, 318 N.C. 602, 350 S.E.2d 56 (1986); *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986); *State v. Davis*, 317 N.C. 315, 345 S.E.2d 176 (1986); *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986); *State v. King*, 316 N.C. 78, 340 S.E.2d 71 (1986); *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986); *State v. Sidden & Blankenship*, 315 N.C. 539, 340 S.E.2d 340 (1986); *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986); *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985); *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985); *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985); *State v. Payne*, 312 N.C. 647, 325 S.E.2d 205 (1985); *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982).

In two additional cases, after finding factors in aggravation and in mitigation, and finding that the aggravating factors outweighed the mitigating factors, the juries were unable to unanimously agree on the substantiality issue and a life sentence was imposed by the trial court. *State v. Massey*, 316 N.C. 558, 342 S.E.2d 811 (1986); *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985).

Prior to the 1983 decision of the Supreme Court of North Carolina in *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983), which mandated the present order of submission of the sentencing issues, the substantiality issue was often presented to the sentencing jury as the second issue. This order followed the statute. N.C.Gen. Stat. § 15A-2000(c) (1983). The jury was asked to determine whether statutory aggravating factor(s) existed and, if so, to then determine whether such a circumstance(s) found by them was sufficiently substantial to call for the imposition of the death penalty. Then, as now, these determinations were made unanimously beyond a reasonable doubt. In at least twelve cases in which that order was followed, juries found at least one factor in aggravation but found the factor(s) insubstantial, resulting in the imposition of a life sentence. This determination obviated the jury's reaching any evidence proffered by that defendant in mitigation. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982); *State v. Fox*, 305 N.C. 280, 287 S.E.2d 887 (1982); *State v. Bauguss*, 310 N.C. 259, 311 S.E.2d 248 (1984); *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984); *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983); *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983); *State v. Smith & Smith*, 301 N.C. 695, 272 S.E.2d 852 (1981); *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425 (1980); *State v. Weimer*, 300 N.C. 642, 268 S.E.2d 216 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980); *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979) (on remand for resentencing).

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nized the *McKoy* decision below, this fourth issue is one of the important distinguishing features between North Carolina's procedure and the Maryland procedure reviewed in *Mills:*

> First, the instructions to the jury as to when it must impose the death penalty are different. Maryland's procedure required the jury to impose the death penalty if it "found" at least one aggravating circumstance and did not "find" any mitigating circumstances. It also required the jury to impose the death penalty if it unanimously found that the mitigating circumstances did not outweigh the aggravating circumstances. Issue Three here requires the jury to weigh the "found" mitigating circumstances against the "found" aggravating circumstances. In contrast to the Maryland procedure, however, it does not mandate the death penalty where there are no mitigating circumstances and at least one aggravating circumstance, nor does it mandate the death penalty if the mitigating circumstances do not outweigh the aggravating circumstances. Rather, it requires the jury then to answer Issue Four. Issue Four ensures that a jury may return a

(Footnote 7 continued from previous page)

The foregoing clearly demonstrates that the substantiality issue is hardly an illusory step in North Carolina's weighing and balancing process. Requiring juries to determine this issue, unanimously beyond a reasonable doubt, ensures against arbitrary action by a juror mandating a death sentence.

(Because a life sentence was imposed in these cases, the reported opinions of the Supreme Court of North Carolina often do not discuss the specific issue resolution by the jury in the sentencing phase. Consequently, the State of North Carolina has lodged with this Court copies of the issue sheets in each of the cited cases. These documents were obtained from either the official record on appeal from the Supreme Court of North Carolina or the official court file of the Clerk of Superior Court of the county in which the case was tried.)

> recommendation of life imprisonment if it feels that the aggravating circumstances are not sufficiently substantial to call for the death penalty, even if it has found several aggravating circumstances and no mitigating circumstances. Maryland's capital-sentencing procedure, which the Supreme Court found constitutionally infirm in *Mills*, did not include a section equivalent to Issue Four here.

McKoy, 323 N.C. at 40, 372 S.E.2d at 33.

The North Carolina sentencing procedure creates no danger that "a single juror could block...consideration [of mitigation] and consequently require the jury to impose a death sentence." *Mills*, 108 S.Ct. at 1870. Thus, North Carolina's sentencing procedure can accommodate constitutionally the burdens of proof placed upon the parties.

C. This Case Is Not Controlled By Lockett v. Ohio.

The Supreme Court of North Carolina held that its relevancy requirement and fourth sentencing issue distinguished North Carolina's unanimity requirement from the *Mills* holding. McKoy belittles these distinctions as making no difference in analyzing the constitutionality of North Carolina's unanimity requirement. He contends that precluding consideration of any mitigating evidence in the ultimate sentencing decision "is no less *Lockett* error merely because the jury could have returned a life sentence on the basis of something other than the precluded mitigation." (Brief at 32) He further states that "*Mills* and the cases upon which it relies stand for the constitutional rule that the death penalty may not be imposed where there is a barrier to the sentencer's consideration of *any part* of the case for mitigation." (Brief at 32) (emphasis original)

Contrary to McKoy's assertions, *Mills* does not hold

that a unanimity requirement is an automatic *Lockett* error. This Court set aside Mills' death sentence out of concern that the Maryland instructions possibly precluded the jury from continuing to consider relevant mitigating evidence. *Mills* does not prohibit a state from precluding jury consideration of legally irrelevant evidence.

If *Mills* stands for the proposition that the state can at no time remove from jury consideration initially relevant evidence which subsequently fails to meet a reliability standard, then any instruction requiring the jury or the individual jurors to hold the defendant to any standard of proof as to the evidence presented is just as violative of *Mills* and *Lockett* as the unanimity requirement employed by North Carolina.[8] Such a result substantially undermines the objectivity of the sentencing process. The application of binding evidentiary standards is an integral part of a capital sentencing structure. Standards help to promote reliability and uniformity among the cases in the jurisdiction. To remove from the state the right to demand that all evidence—mitigating as well as aggravating—used in the sentencing process be reliably proven would endanger the eighth amendment goal of rationality in the capital sentencing process. This course inevitably would allow juries to base their recommendations on individual whim, supposition, emotion, or even prejudice, rather than on reliably proven factors.

If this Court is prepared to accept McKoy's argument that the standardless consideration of evidence proffered in mitigation is a constitutional requirement, then it will have travelled full circle since *Furman v. Georgia*, 408 U.S. 238 (1972), holding that the very aspect of capital

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[8]In *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) *(limited en banc), cert. pending*, ___ U.S. ___, 88-1553 (filed March 20, 1989), the Ninth Circuit has already, on the basis of *Lockett*, prohibited burdens of proof as to existence of mitigation and thereby begun a retreat toward the standardlessness condemned in *Furman v. Georgia*, 408 U.S. 238 (1982).

punishment that once made it unconstitutional—totally unguided juror discretion—now is necessary to comply with the eighth amendment. That this untrammelled discretion would occur as to mitigating evidence does not diminish the seriousness of this standardlessness. Society, as well as the defendant, has a stake in the outcome of the sentencing hearing. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). While occasional grants of mercy are not unconstitutional, *Gregg v. Georgia*, 428 U.S. 153, 199 (1976), it is important that sentences of life, like sentences of death, appear based on reason, not mere sympathy or prejudice—factors which should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor." *California v. Brown*, 479 U.S. 538, 542 (1987). Standardless consideration of mitigating evidence "invites a return to the pre-*Furman* days when the death penalty was generally reserved for those whom society has least consideration." *Lockett*, 438 U.S. at 623 (White, J., concurring in part and dissenting in part). Indeed, such unchannelled consideration of evidence proffered in mitigation "will not guide sentencing discretion but will totally unleash it." *Lockett*, 438 U.S. at 631 (Rehnquist, J., concurring in part and dissenting in part). The consequences of such standardlessness extend beyond the "cases in which they occur, for when some defendants are able to avoid execution based on irrelevant criteria, there is a far graver risk in executing others." *Skipper*, 476 U.S. at 14 n.2 (Powell, J., concurring).

A plurality of this Court, recognizing the dangerousness of such unfocused consideration of mitigating evidence, recently stated:

> *Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. . . . Given the awesome power that a sentencing jury must exer-

> cise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities.

Franklin, 108 S.Ct. at 2329.

The unanimity requirement, then, is not, as McKoy argues, an issue foreclosed by *Lockett* and *Mills*.[9] Rather, it is an issue in the confluence of the two lines of authority which form the basis of eighth amendment jurisprudence. The eighth amendment requires "replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death," *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976), and that "a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the offense." *Brown*, 479 U.S. at 544 (O'Connor, J., concurring). These two stated goals are in tension, to a degree, with each other. *Franklin*, 487 U.S. at 2330 (plurality opinion); *Brown*, 479 U.S. at 544 (O'Connor, J., concurring). *See also Lockett*, 438 U.S. at 619 (Marshall, J., concurring). Both competing interests are involved in determining the appropriateness of the North Carolina capital sentencing procedure's allocation of burdens of proof. The balance struck by North Carolina's legislature and refined by its Supreme Court is sufficiently sensitive to accommodate constitutionally both these competing interests.

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[9]It is superficially appealing to extend *Lockett's* and *Eddings'* requirement of consideration of relevant mitigating evidence into an analysis of burdens of proof. The State of North Carolina once advocated such a conclusion. *Kirkley*. Upon further reflection, however, the State recognized it misperceived the scope of *Lockett* and, accordingly, disavowed its contention in *Kirkley*. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Hensley v. United Planters' National Bank & Trust Company*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). Full consideration of evidence proffered to prove mitigation and the evidentiary burdens of proof necessary to prove the existence of mitigating factors are two entirely different issues.

D. Burdens of Proof May Be Placed on a Defendant to Prove the Existence of Mitigating Factors

This Court, in *Patterson v. New York*, stated

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by individual States. . . . [I]t is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of production of evidence and the burden of persuasion," and its decision in that regard is not subject to proscription under the due process clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."
>
> * * *
>
> If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty.

432 U.S. at 201-02, 209 (citations omitted). *See also Martin v. Ohio*, 480 U.S. 228, 233–34 (1987); *Leland v. Oregon*, 343 U.S. 790, 798 (1952). There is nothing about a capital sentencing hearing that should cause this Court to construe *Lockett* or *Mills* as mandating an exception to the generally accepted principle espoused in *Patterson*, *Martin*, and *Leland* concerning the state's prerogative to assign a burden of persuasion to a defendant.

In *Lockett* and *Bell v. Ohio*, 438 U.S. 637 (1978), this Court left unanswered the issue of the propriety of the state's placing a burden of persuasion as to mitigating factors on the defendant. However, even the petitioner in *Lockett* recognized that where there is a right to place any

evidence which arguably mitigates in front of the jury, there is no constitutional barrier to placement of a burden of proof on a defendant. Petitioner Lockett stated, "The federal constitutional question raised by this allocation of the burden of proof takes shape within the framework of the particular Ohio death-sentencing process as a whole. Unlike many other States, Ohio does not have an open-ended roster of 'mitigating circumstance' [sic] as to which convenience might dictate that the burden of going forward (or even perhaps the burden of persuasion) should be cast upon a defendant who is on trial for his life." *Lockett*, Petitioner's Brief at 88. Likewise, individual justices of this Court have stated, either explicitly or implicitly, that evidentiary burdens to prove mitigation may be placed on the defendant. "There can be no infirmity in shifting the burden of persuasion to the defendant." *Lockett*, 438 U.S. at 633 (Rehnquist, J., concurring in part and dissenting in part); "'Evidence in mitigation' must rise to a certain level of persuasiveness before it can be said to constitute a 'mitigating circumstance.'" *Eddings*, 455 U.S. at 112 (Burger, C. J., dissenting); *but see Stebbing v. Maryland*, 469 U.S. 900, 902–03 (1984) (Marshall, J., dissenting from denial of *certiorari*).

A sentencing hearing is similar to a trial in many ways. *Strickland v. Washington*, 466 U.S. 668 (1984); *Bullington*. Jurors engage in much the same type of line drawing which a jury does during a guilt stage of a proceeding. *Proffitt v. Florida*, 428 U.S. 242, 257 (1976). There is nothing about the nature of mitigating evidence or finding mitigating factors which precludes placing an affirmative burden as to their existence on a defendant. As stated in *Proffitt:*

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a fact finder in a law suit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the . . . mitigating circumstances.

428 U.S. at 257–58.

Historically, defendants have borne the burden of proving mitigation. "All . . . circumstances of justification, excuse, or alleviation rested on the defendant." 4 W. Blackstone's Commentaries 201 (1803 First Ed., Reprinted 1969). Since *Furman*, many states have placed burdens of proof on defendants to prove mitigation in capital sentencing hearings.[10] This Court's cases "have insisted that the channelling and limiting of the sentencer's discretion . . . is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 487 U.S. ___, 108 S.Ct. 1853, 1858 (1988). This goal is furthered by states' placing evidentiary burdens on the defendant to prove proffered mitigating circumstances to a reasonable degree of certainty.

As the Supreme Court of North Carolina's opinion in *Kirkley* reveals, the requirement in North Carolina that a mitigating factor must be found to exist unanimously before it may be used in the balancing process is nothing more than the state's placing upon a defendant an evidentiary burden to prove his claimed mitigation to the jury by reliable evidence. That the burden of proof includes a unanimity requirement does not render it offensive to due

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[10]Various states by statute or case law explicitly place upon a defendant a burden to prove evidence in mitigation by a preponderance of the evidence. *E.g.*, Arizona, *State v. Rossi*, 741 P.2d 1223 (Ariz. 1987); Maryland, Art. 27 § 413(g) (1987 Rep. Vol.) (1975); North Carolina, *State v. Johnson*, *supra*; Pennsylvania, 42 Pa. Const. Stat. § 9711(c)(1)(iii); Connecticut, Conn. Gen. Stat. §53a-46(a) (West 1977). In Florida, jurors are instructed that defendant has established a mitigating circumstance if the jurors are "reasonably convinced [it] exists." Fla. Std. Jury Instr. (Crim) §F.S. 921.141(6) (1985).

process. With twelve-person juries, the issue of unanimity or nonunanimity is an issue left to the states. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). There is nothing inherently offensive to "some principle of justice so rooted in the traditions or conscience of our people . . ." *Patterson*, 432 U. S. at 202, in requiring a party to prove unanimously a subsidiary issue in a sentencing hearing before it can be used to balance against other similarly found subsidiary issues.

Majority verdicts on guilt or innocence are constitutionally permissible with twelve-person juries. *Johnson v. Louisiana; Apodaca*. Such decisions are far more fundamental than a factual finding that forms a subpart of a sentencing recommendation. The advisory jury recommendation as to life or death in some states need only be by a majority recommendation. *See:* Fla. Stat. Ann. § 921.141(3) (1985); Ala. Code § 13A-5-46(f) (1982); *cf.* Tex. Code Crim. Proc. Ann., art. § 37.071(d)(2) (Vernon 1981) (While twelve jurors must agree that one of the three issues exists, only ten jurors are required to find it does not exist). In Connecticut, the capital sentencing decision by a three-judge panel need not be unanimous. Conn. Gen. Stat. Ann. 53a-45(b)(West 1977). If it is constitutional for states to permit an ultimate decision such as a verdict of guilty or recommendation of death to stand even where all the jurors or judges do not agree with that decision, it is within the prerogative of the state to deem a burden of proof not reached if the existence of a factor is not unanimously agreed upon by the jury. In *Patterson* this Court stated: "If the State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment . . . the State may assure itself that the fact has been established with reasonable certainty." 432 U.S. at 209. The unanimity burden guarantees that any factors utilized, aggravating as well as mitigating, are established with reasonable certainty. This policy choice by the State of North Carolina furthers the goal of providing the jury

with some framework for discharging its responsibilities. It channels sentencing discretion with clear and specific guidance which makes the process rationally reviewable. *Godfrey*, 446 U.S. at 428.

The burden of persuasion placed upon a defendant by North Carolina is arguably different from burdens of proof imposed upon defendants in capital cases by some other states. These differences do not undermine the validity of North Carolina's policy choice. *Martin; Leland*. This Court has made clear several times that, "we are unwilling to say that there is any one right way for a State to set up its capital punishment scheme." *Spaziano v. Florida*, 468 U.S. 447, 464 (1984); *Cabana v. Bullock*, 474 U.S. 376 (1986); *Baldwin v. Alabama*, 472 U.S. 372 (1985); *Pulley v. Harris*, 465 U.S. 37 (1984).

In the context of the North Carolina sentencing statute, a burden of persuasion which requires unanimity does not create a risk such as the one identified in *Mills*—that the unanimity burden of proof could transform the sentencing structure into an arbitrary one which would mandate a death sentence despite the wishes of the majority of the jury. While evidence not found unanimously to support a mitigating factor could not be used in steps three and four —just as evidence not found to support aggravating factors could not be used—the absence of this evidence would not automatically force a death verdict. North Carolina's procedure offends neither the eighth amendment nor fourteenth amendment notions of due process by conditioning continued relevancy of evidence proffered in mitigation on a defendant's meeting this unanimity burden of proof.

E. Unanimity Is Sound Public Policy

The Constitution of North Carolina requires unanimity

in jury verdicts in criminal cases. N.C. Const., article I § 24. Consistent with this command, the legislature provided that any capital sentence recommendation by a jury be unanimous. N.C. Gen. Stat. § 15A-2000(b) (1983). Beyond the constitutional and statutory bases for unanimity in the sub-issues, there are sound policy reasons to require a unanimous determination of both aggravating and mitigating factors.

Eighth amendment jurisprudence shows a repeated concern for accuracy in evidence used by the sentencer. *Johnson v. Mississippi*, 486 U.S. ___, 108 S.Ct. 1981 (1988); *Gardner*. The need for such accuracy is no less compelling because the evidence is proffered in mitigation as opposed to aggravation. The unanimity requirement for finding the existence of both aggravating and mitigating factors best ensures that only reliable information is used in the sentencing determination. In the context of North Carolina's narrowly drawn sentencing statute, failure to enforce such binding evidentiary standards would permit individual jurors to employ whimsical and speculative evidence in balancing against statutorily limited aggravating factors which must be found to exist unanimously and beyond a reasonable doubt. One end of the sentencing equation would be capable of being weighted with inaccurate or unreliable information, or even caprice or emotion. Such a result frustrates completely any attempt by North Carolina to have the recommendation reflect the use of objective, reviewable standards. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358. The unanimity requirement, which limits sentencing considerations to accurate information in mitigation as well as aggravation, serves this function.

The purpose of a jury is to "promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community." *Burch v. Louisiana*, 441 U.S. 130, 133 (1979). Each of these integral reasons for having the jury as the trier of fact at the guilt stage is equally compelling for capital sentencing. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968); *Spaziano*. The unanimity requirement promotes each of these purposes. Group deliberation is enhanced by the requirement that the jury agree unanimously on factors both in aggravation and mitigation. It is the discussion and debate over the existence of these factors which force the jury to examine the evidence in light of all the jurors' experiences and backgrounds. "The forensic process of forcing jurors to defend their conflicting recollections and conclusions flushes out many nuances which otherwise would go overlooked." *Johnson v. Louisiana*, 406 U.S. at 389 (1972) (Douglas, J., dissenting). This debate aids the jury in assigning to the factors the value necessary to make each factor found a reliable component in the guided, yet individualized, inquiry into a defendant's moral culpability as required by the eighth amendment. Informing each juror that he may consider whatever he desires in mitigation, notwithstanding the view of his fellow jurors, subverts the intensive group deliberation required to achieve a reliable sentencing decision. A requirement that findings in mitigation as well as aggravation be unanimous likewise insulates each juror from outside pressure since all must agree on and record each factor found to exist.

While not constitutionally required, jury sentencing in capital cases has wide acceptance among the states since "the imposition of the death penalty . . . is an expression of community outrage" and "the jury serves as the voice of the community." *Spaziano*, 468 U.S. at 461. Requiring unanimity causes the community's cross-section—the

jury—based on the jurors' varied backgrounds, to conclude that evidence presented by the defendant is sufficiently credible in the community's view to support the existence of a mitigating factor. This requirement for common acceptance by the jurors of a mitigating factor suggested by a defendant enhances rationality in sentencing. Failing to require unanimity would harm the value of the jury as a representative cross-section of the community in sentencing. Each juror would be free to exercise his own unfettered views as to what mitigates as opposed to being bound to consider only those circumstances which the jury—and by analogy the society it represents—all agree lessens the moral culpability of an individual for a crime. Rather than reflecting a reliable understanding of what society's voice believes to be mitigating, judgments where unanimity is not required would be susceptible to individual whim and caprice.

Not only does unanimity in finding mitigating factors work to promote the reliability of the jury's deliberative process, it also "ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process." *Brown*, 479 U.S. at 543; *Harris*. North Carolina's proportionality review is a part of its mandatory appellate review of capital cases. N.C. Gen. Stat. § 15A-2000(d)(2) (1983). The cases against which a capital case is compared are those in which a capital sentencing hearing was held. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865 (1983). The Supreme Court of North Carolina "'compare[s] the case at bar to other cases in the pool that are roughly similar with regard to the crime and defendant. . . .' For this purpose the manner in which the crime was committed and the defendant's character, background, and physical and mental condition are relevant considerations." *State v. Brown*, 320 N.C. 179, 220, 358 S.E.2d 1, 27 (citation omitted), *cert. denied*, ___ U.S. ___, 108 S.Ct. 467 (1987). This review will be hampered if the court is

deprived of information concerning which mitigating factors the jury employed in making the ultimate life or death decisions. Both during the sentencing hearing and during appellate review of the sentence, the reliability of North Carolina's procedure is enhanced by requiring unanimity of findings in mitigating as well as aggravating factors.

F. The Unanimity Requirement Does Not Provide Each Juror A "Blackball" And Thus Threaten Reliability Of The Recommendation.

Throughout his brief McKoy has employed the crude and emotionally laden term "blackball" to describe North Carolina's unanimity requirement. Use of this term mischaracterizes North Carolina's procedure. North Carolina's system can no more be described as a "blackball" system than can that of Florida or Indiana where one judge can override the considered opinions of up to twelve other persons. *Dobbert v. Florida*, 432 U.S. 282 (1977). A judge in Florida or Indiana can override the wishes of the advisory jury only pursuant to strict standards. *Tedder v. State*, 322 So.2d 908 (Fla. 1975); Ind. Code § 35-50-2-9(d) (Burns 1977). In North Carolina, a juror is not permitted to reject evidence except pursuant to clear standards relating to credibility or burdens of persuasion. Thus, neither system can be referred to as employing a "blackball" since that term connotes unprincipled, arbitrary, prejudiced action by one to deny a right or privilege. The North Carolina system is geared towards ensuring responsible action. As this Court recognized in *Caldwell v. Mississippi*, 472 U.S. 320 (1985):

> Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. . . . The sentencing scheme's premise

> . . . [is] . . . "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision". . . . Belief in the truth of this assumption . . . has allowed this Court to view sentencer discretion as consistent with—and indeed indispensible to—the Eighth Amendment's "need for reliability. . . ."

472 U.S. at 329–30 (citations omitted). There is no need to rely simply on this presumption in a vacuum. As Justice Powell, concurring in *Johnson v. Louisiana*, noted in another context:

> [Each state] has at its disposal protective devices to diminish significantly the prospect of jury irresponsibility. Even before the jury is sworn, substantial protection against the selection of a representative but wilfully irresponsible jury is assured by the wide availability of peremptory challenges and challenges for cause. The likelihood of miscarriage of justice is further diminished by the judge's use of full jury instructions, detailing the applicable burdens of proof, informing the jurors of their duty to weigh the views of fellow jurors, and reminding them of the solemn responsibility imposed by their oaths.

406 U.S. at 379–80 (Powell, J., concurring).

North Carolina provides a capital defendant with fourteen peremptory challenges. N.C. Gen. Stat. § 15A-1217 (1983). *Voir dire* questioning is generally quite liberal to assure responsible use of challenges. *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *modified as to death penalty*, 428 U.S. 902 (1976). A capital defendant accused of an interracial murder is entitled to have prospective jurors questioned on the issue of racial bias.

Turner v. Murray, 476 U.S. 28 (1986). The State may not employ its peremptory challenges in a racially discriminatory manner. *Batson v. Kentucky*, 476 U.S. 79 (1986). Jurors who cannot consider a sentence of death are removable for cause. N.C. Gen. Stat. § 15A-1212 (1983); *Wainwright v. Witt*, 469 U.S. 412 (1985). So are jurors who cannot consider a sentence of life. *Ross v. Oklahoma*, 487 U.S. ___, 108 S.Ct. 2273 (1988). Thus, jury selection removes those persons unable to accept concepts of mitigation or the instructions of the court. North Carolina's capital sentencing instructions and issue forms are detailed and specifically tailored to each case (see J.A. 4–26). These instructions give full explanations of both credibility evaluations and burdens of proof. The jury is often told (and indeed was told in this case) of its duty to consult with and listen to fellow jurors while deliberating (J.A. 21). N.C. Gen. Stat. § 15A-1235 (1983). After the jury returns its sentencing recommendation, the jury must be individually polled to establish that each juror concurs and agrees to the sentence recommendation returned. N.C. Gen. Stat. § 15A-2000(b) (1983). Therefore, North Carolina's process—from jury selection to jury poll—ensures rational and reliable decision making.

The findings by the jury in this case fail to support McKoy's speculation as to possible arbitrary action. McKoy asserts "[b]ecause the jury failed to achieve unanimity as to these circumstances, it was prohibited from considering any of the substantial evidence relating to the circumstances in deciding whether Dock McKoy should live or die." (Brief at 27–28) This is gross speculation. The transcript fails to reveal any juror disagreement as to factors found or not found. If anything, the jury's findings in mitigation flow almost inevitably from the prior unanimous guilt phase determinations rejecting the insanity defense and convicting McKoy of premeditated murder.

The unfound circumstances "that the capital felony was

committed while the defendant was under the influence of mental or emotional disturbance," "that for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated," "that Dock McCoy's mental and emotional disturbance is aggravated by his poor physical health," and "Dock McCoy's ability to remember the events of December 22, 1984 is actually impaired" are dependent upon the testimony of Dr. Rollins, a psychiatrist who examined McKoy six months after the murder (T. 890). The jury, at the guilt phase of this trial, unanimously rejected Dr. Rollins' opinions by repudiating the insanity defense which was based on his testimony. The evidence to support the aforementioned factors depended almostly entirely on Dr. Rollins' opinions formed during his examination of McKoy. No more than a *de minimus* nexus was established between the claimed chronic personality disorders testified to by Dr. Rollins and McKoy's state of mind during the murder. Dr. Lara, the other consulting psychiatrist, testified that McKoy had a personality disorder but did not specifically link that disorder to a claim that McKoy committed the murder while under the influence of a mental or emotional disturbance.

McKoy introduced no supporting evidence to bolster Dr. Rollins' assertions beyond some opinion testimony by Dr. Lara. Much of the lay testimony in this case disputes the psychiatrists' opinions. For instance, although in Dr. Rollins' opinion McKoy's memory of the events was actually impaired, Dr. Lara's opinion was, at best, equivocal. The testimony of the officers who took McKoy's confession as well as that of the emergency room physician directly contradicted Dr. Rollins' opinion of McKoy's alleged memory impairment. Likewise, no evidence from McKoy's neighbors or the officers supported the opinion of the psychiatrist that McKoy was emotionally disturbed at the time of the offense as opposed to merely drunk and

belligerent. In fact, the evidence revealed McKoy had held a job with no problems and had proven to be a dependable worker for nearly four years.

The jury also failed to find McKoy's age as mitigating. This hardly indicates jury arbitrariness. There was no showing that McKoy's age reflected a lessened moral culpability, especially when viewed from the perspective of his apparent refusal to learn from his past experiences of incarceration following prior assaultive and murderous actions.

The two factors found by the jury were supported by evidence in addition to mere opinions formed months after the murder. The jury found impairment of McKoy's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and also that McKoy had a low level of intellectural functioning. Both Dr. Lara and Dr. Rollins testified these conditions were present. Significantly, these opinions were bolstered either by concrete evidence such as test scores on IQ tests or by testimony from persons who had observed McKoy's behavior on the day of the crime.

The jury in this case spent at least four hours over a two-day period deliberating the appropriate penalty in this case (J.A. 17–22). The jury unanimously assented to that recommendation when polled. The findings reflect the jury found all things proffered in mitigation supported by something besides a psychiatrist's opinion. Thus, far from showing that the findings in mitigation were the probable result of failures to agree, the findings show the kind of line drawing expected from a jury which takes its responsibilities seriously and looks to those things reliably proven upon which to base a sentencing recommendation.

CONCLUSION

McKoy asks this Court to expand *Mills* to invalidate North Carolina's prerogative to place a reasonable burden of persuasion on a defendant to prove mitigating factors to the satisfaction of the entire jury. The result of such a holding on a sentencing system such as North Carolina's will be to infect one side of a finely drawn balancing equation with absolute, unfettered discretion. To hold such unbridled discretion constitutionally mandated will return this Court to the pre-*Furman* era since this Court will be requiring, as a matter of constitutional law, albeit as to a narrowed group of defendants, the very unguided juror discretion which *Furman* justly condemned. North Carolina has used its burden of proof to reconcile the two competing principles of eighth amendment jurisprudence —individualized consideration and objective, rationally reviewable standards—through the structuring of its issues and burdens of proof. This Court should not interpret *Mills* to invalidate this system. The judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

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